87-2002

Supreme Court, U.S.
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NO. _____

In The

Supreme Court of the United States

October Term, 1988

RIGHT TO LIFE ADVOCATES, INC., ETC., ET AL.,
Petitioners,

VS.

AARON WOMEN'S CLINIC,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Attorney of Record for Respondent

QUESTIONS PRESENTED

1. Whether the requisite state action and jurisdiction exists sufficient to warrant the granting of the Petition for Writ of Certiorari.

2. Whether the State of Texas violated Federal due process requirements under the Fourteenth Amendment when it decided that Petitioners had no standing to raise an unmeritorious defense.

3. Whether Roe v. Wade should be overruled.

LIST OF ALL PARTIES

A. PETITIONERS:

1. RIGHT TO LIFE ADVOCATES, INC. "d/b/a ABORTION ABUSE ADVICE & INFORMATION SERVICE, ABORTION ABUSE & ADVISORY INFORMATION HOTLINE, and CRISIS PREGNANCY CENTER OF HOUSTON";

2. CRAIG K. ANDERSEN;

3. J. (JIM) BAILEY;

4. LEE P. HELMKE;

5. GARY LOTH;

6. BARBARA A. MARTONE;

7. JOHN A. MARTONE;

8. KATHY MATHEMS;

9. SHEILA MCINTOSH; and

10. JOSEPH J. PESL.

B. RESPONDENT:

1. AARON WOMEN'S CLINIC (which is an assumed name of ORIENT SALES CORPORATION, a corporation).

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ARGUMENT AND AUTHORITIES

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE, UNDER THE UNITED STATES CONSTITUTION, THIS DISPUTE BETWEEN PRIVATE PARTIES DOES NOT INVOLVE THE REQUISITE STATE ACTION.

It is well settled that the exercise of an individual's right of free speech and assembly on a privately owned shopping center, irrespective of its size or the character of the property, is not a protected activity under the First Amendment of the United States Constitution. Lloyd Corporation v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L.Ed.2d 131 (1972); Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L.Ed.2d 196 (1976); Right to Life Advocates, Inc. v. Arron Women's Clinic, Supplemental Memorandum of the Trial Court. This is so because the Federal Constitution prohibits governmental infringement of constitutional rights and it does not protect against conduct of purely private actors. The defendants make no pretense of satisfying the "state action" requirement necessary to invoke the protection of the Federal Constitution. See, e.g. State v. Schmid, 84 N.J. 535, 423 A.2d 615 (S. Ct. N.J. 1980, appeal dismissed sub nom.), Princeton University v. Schmid, 455 U.S. 100, 102 S. Ct. 867, 70 L.Ed.2d 855 (1982).

Petitioner's attempt to cure this jurisdictional defect by arguing that state action exists (the decision of the Texas Court of Appeals and Texas Supreme Court) and that such supports a violation of the United States Constitutional Amendment Fourteen is not well founded. The Texas Court of Appeals denied Petitioner's argument of unclean hands for the reason that 1) Petitioners did not show injury to them so as to be

entitled to raise the defense (all of the cases cited by Petitioners in support of their injury argument in fact involved parties that themselves had legal or proprietary interests in the subject matter of the dispute) and 2) Respondents were not guilty of unclean hands inasmuch as Roe v. Wade, 410 U.S. 113 (1973) established the legality of pregnancy terminations within the limitations set forth in Roe v. Wade. Petitioner's second point of error complaining of the decision of the Texas Supreme Court upholding the Court of Appeals is founded on the same argument. Such an argument presents no issue to this Court under the Federal Constitution.

Analogously, Petitioner's attempt to present to this Court another constitutional challenge to Roe v. Wade is not well founded. Such must be raised in the context of state action, referenced previously, and no party to this lawsuit, nor the actions of any party, constitute such state action as is required before a Petition for Writ of Certiorari to this Court would be well founded.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED OVER THE CONSTITUTIONAL ISSUES PRESENTED IN THIS APPEAL FOR THE REASON THAT SAME WERE NOT PRESERVED IN THE TRIAL COURT.

Petitioner's arguments made under the Fourteenth Amendment to the Texas Constitution and the numerous challenges to Roe v. Wade were not preserved in the Trial Court. (Tr 27, 41). According to Petitioner's Petition for Writ of Certiorari, Roe v. Wade is requested to be reconsidered on the basis of what is allegedly substantial social and policy grounds. This was not adequately presented to the Trial Court as the Statement of Facts and the Transcript constituting the

record transmitted to this Court will readily reveal. Petitioner's pleadings in the Trial Court did not plead, and Petitioner's evidence proffered in the Trial Court did not support, the arugments and challenges that Petitioners now seek to make in this Court to Roe v. Wade. Rather, Respondent's suit was challenged by defenses allegedly raised under the Fifth, Ninth and Tenth Amendement to the Federal Constitution. Though Petitioners have proposed to raise certain other constitutional issues in the Trial Court, such are issues not carried forward to the Petition for Writ of Certiorari. Having failed to raise such issues in their petition in the Trial Court (when Respondent would have had the opportunity to controvert same with evidence relating to such issues, which Respondent did not have the opportunity to do), Petitioners are precluded from raising those issues in this Court.

III.

THE TEXAS COURTS DID NOT VIOLATE THE DUE PROCESS CAUSE OF THE FOURTEENTH AMENDMENT IN THEIR DECISION SINCE PETITIONERS HAD NO STANDING TO RAISE THEIR DEFENSE OF UNCLEAN HANDS AND THEIR DEFENSE WAS UNMERITORIOUS (GERMANE TO PETITIONER'S POINTS OF ERROR I AND II)

Petitioner's argument must fail in the first analysis for the reason that Respondent's are not guilty of unclean hands. Roe v. Wade, 410 U.S. 113 (1973), within the standards set forth therein, established the legality of pregnacy terminations. This stands as the law of the land and any potentially contrary law (referenced in Petitioner's Points of Error III and IV) could not stand in the face of this Court's decision. Operating a legal business in a lawful manner cannot constitute unclean hands as a matter of law.

Additionally, as held by the Texas Court of Appeals, a party such as Petitioner asserting the equitable defense of unclean hands to injunctive relief (all arising under Texas State Law) must, as a matter of Texas State Law, show that such party, and not some third-party, was injured by the conduct of the party seeking the injunction (Respondents). Omohundro v. Matthews, 161 Tex. 367, 341 S.W.2d 401, 410 (1960). The Court of Appeals examined all cases cited by Petitioners and found that such cases did not deviate from the requirement of injury to the complaining party. Each of the cases cited by Petitioners in their Petition for a Writ of Certiorari to this Court, are distinguishable. In City of Wink v. Griffith Amusement Company, 129 Tex. 40, 100 S.W.2d 695 (1936) the Supreme Court ruled that the amusement company that sued the city to enjoin the city from enforcing the city's existing anti-lottery ordinance was not entitled to the injunction because its business violated the public policy and law of the State and thus the amusement company did not come into Court with clean hands. In Humphries-Mexia Company v. Arsneaux, 116 Tex. 603, 297 S.W. 225 (1927), the oil company and water company had colorable rights to the property in question and would have the requisite standing. In Riley v. Davidson, 196 S.W. 2d 557, 559-560 (Tex. Civ. App.-Galveston 1946, writ ref'd n.r.e.) the Court of Appeals held that one who could suffer a health injury could raise the defense of unclean hands against the party (the owner of the water supply line) committing acts in violation of the health law. In all of these cases, the parties before the Court had real interests in the controversy and were acting to protect their rights. Distinguished from this line of cases is the current situation where Petitioners are not suffering the harm, if any, by pregnancy termination. As against a challenge to Petitioner's inability to fullfill a Texas legal prerequisite to asserting a Texas defense to a Texas equitable remedy, Petitioners have not shown the requisite standing as would be required to sustain Petitioner's position.

IV.

ROE V. WADE SHOULD NOT BE OVERRULED (GERMANE TO PETITIONER'S POINTS OF ERROR III AND IV)

It should be inititally noted that Petitioner's strain to confer jurisdiction on this Court to overrule Roe v. Wade within the context of Petitioner's unclean hands defense (referenced in I, surpa) Given that such arguments fail, the underlying rationale for presenting another challenge to Roe v. Wade in this Court must also fail. In the absence of Petitioner's standing, as described above, Petitioners do not present a valid jurisdictional or procedural challenge to Roe v. Wade in their Petition for a Writ of Certiorari.

Additionally, Roe v. Wade has been examined and re-examined on numerous occasions by this Court. The same reasons as caused this Court to decide Roe v. Wade initially stand as arguments as to why Roe v. Wade should not be overruled. Roe v. Wade having withstood numerous constitutional challenges since its decision, and Petitioner's arguments primarily re-presenting many of these arguments, this Petition for a Writ of Certiorari presents no new constitutional arguments that should be reviewed.

As to the additional reasons referenced in Petitioner's Petition for a Writ of Certiorari, such are not supported by evidence in this record, were not raised in the Trial Court and in fact (when considered and reviewed), do not provide sufficient grounds for overruling Roe v. Wade (as against the numerous considerations weighing in favor of the initial Roe v. Wade decision and its support since the decision).

CONCLUSION

For the reasons and authorities stated, it is submitted respectfully that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed certified, return receipt requested to Mr. Thomas C. Sanders, 5874 San Felipe, #1250, Houston, Texas 77057 and Mr. Richard W. Schmude, P. 0. Box 674, Tomball, Texas 77375 on this 1 day of July, 1988.

JOHN W. BERKEL